Supreme Court, U.S.
FILED

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NO:

IN THE

Supreme Court of the United States

October Term 2000

ROBERT GILCHRIST, D/B/A CONCAN CABLE TV
Petitioner

vs.

BANDERA ELECTRIC COOPERATIVE, INC.
Respondent

On Petition for A Writ Of Certiorari
To The Supreme Court of Texas

PETITION FOR A WRIT OF CERTIORARI

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(Counsel of Record)
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Counsel for Petitioner

75pp

QUESTIONS PRESENTED

The Supreme Court of Texas has denied review of a decision of the Texas Fourth Court of Appeals which affirmed an order of the trial court dismissing the Petitioner's cause of action. The dismissal of the Petitioner's cause of action raises three substantial federal questions under the 14th Amendment of the United States Constitution that warrant review by this Court.

1. Whether the trial court's dismissal of the Petitioner's action for failure to file pleadings as ordered by the court, which pleadings were in fact filed timely in accordance with the Texas Rules of Procedure, is in violation of the Petitioner's due process rights guaranteed by the 14th Amendment of the United States Constitution.

2. Whether the trial court's dismissal of the Petitioner's action for failure to file pleadings as ordered by the court, without notice to the Petitioner of intent to dismiss on that basis and opportunity for hearing on such issue, is in violation of the Petitioner's due process rights guaranteed by the 14th Amendment of the United States Constitution.

3. Whether the trial court's notice to Petitioner that failure to appear would result in a show cause to dismiss the following Monday, but where the trial court dismissed the Petitioner's action summarily without waiting for such show cause hearing, is in violation of the Petitioner's due process rights guaranteed by the 14th Amendment of the United States Constitution.

PARTIES TO THE PROCEEDING

The following individuals and entities are parties to the proceeding in the court below:

Robert Gilchrist, d/b/a Concan Cable TV;

Bandera Electric Cooperative, Inc.;

Earle Cobb, Jr., as intervenor;

Earl M. Herring, as amicus curiae.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert Gilchrist, d/b/a Concan Cable TV, respectfully prays that a writ of certiorari be issued to review the order of the Supreme Court of Texas denying review of the Texas Fourth Court of Appeals opinion affirming the decision of the trial court dismissing the petitioner's cause of action. The action of the trial court, in dismissing the petitioner's cause of action, was in clear contravention of the due process rights guaranteed by the 14th Amendment of the United States Constitution.

OPINIONS BELOW

The order of the Texas Supreme Court denying review of the Court of Appeals decision (App., *infra*, 1) is not reported. The decision of the Texas Fourth Court of Appeals affirming the action of the trial court (App., *infra*, 2), an earlier withdrawn decision of the Texas Fourth Court of Appeals that would have reversed the trial court (App., *infra*, 9), and the trial court order of dismissal (App., *infra*, 17), are also not reported.

JURISDICTION

The Supreme Court of Texas denied review of the Texas Fourth Court of Appeals decision on October 26, 2000. The jurisdiction of this Court rests upon 28 U.S.C. Section 1257.

The denial of review by the Supreme Court of Texas is final for purposes of this Court's jurisdiction under Section 1257.

As demonstrated *infra*, petitioner expressly raised below, in both the Texas Supreme Court and the Texas Fourth Court of Appeals, the federal questions presented in this petition. The failure of the courts below to address the petitioner's federal claims is no barrier to review by this Court. A state court cannot evade this Court's review by failing to discuss federal issues in its opinion. *Chapman v. Goodnow's Adm'r.*, 123 U.S. 540, 548 (1887), stating:

> If a federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects a claim, but avoids all reference to it, is as much against the right . . . as if it has been specifically referred to and the right directly refused. 123 U.S. at 548.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV, Sect. 1.

STATEMENT OF THE CASE

I. THE UNDERLYING LITIGATION

Bandera Electric Cooperative originally sued Robert Gilchrist, d/b/a Concan Cable TV, for breach of contract. Robert Gilchrist counter-sued for breach of contract and various other alleged state law causes of action. The trial court initially granted summary judgment for Bandera Electric on all issues. Robert Gilchrist appealed, and the court of appeals affirmed the judgment against Robert Gilchrist, but it reversed and remanded the counter-claims of Robert Gilchrist for trial on the merits.

II. THE PROCEEDINGS IN STATE COURT

Following the remand, the trial court ordered Robert Gilchrist to file his counter-claims in a restated petition on or before the 30 day of October, 1998. This was accomplished in accordance with the Texas Rules of Civil Procedure, Rule 5 (App., *infra*, 19), which states:

> If any document is sent to the proper clerk by first-class United States mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail on or before the last day for filing same, the same, if received by the clerk not more than ten days tardily, shall be filed by the clerk and be deemed filed in time. Rule 5, Texas Rules of Civil Procedure.

The restated petition of Robert Gilchrist was mailed on October 30, 1998, and received by the clerk of the trial court and filed on November 2, 1998, within the ten days. (App., *infra*, 20)

Subsequent to the order to refile his counter-claims on or before October 30, 1998, the cause was also placed on a list of all 150 cases pending in that court for docket call on October 30, 1998. The docket call notice for these 150 cases states that all such cases are set for trial on that date, and states, as well:

> IF NO APPEARANCE IS MADE BY EITHER PLAINTIFF, DEFENDANT, PETITIONER OR RESPONDENT, or their respective counsel, and no postponement has been granted by the Court, it is further ordered that there shall be a show cause hearing held at 9:00 a.m. on the Monday next following the date set out above, for the nonappearing party or counsel to show good cause why a dismissal, default judgment or other sanctions should not be imposed by the Court for the nonappearance at the above time and date.

A. THE STATE COURTS' DECISIONS

Robert Gilchrist's counsel did not appear on October 30, 1998, and the trial court entered an order dismissing all of his causes of action for failure to replead, even though the repled document had been filed in accordance with Rule 5 of the Texas Rules of Civil

Procedure.

The Texas Fourth Court of appeals initially reversed and remanded Robert Gilchrist's causes of action, again, for trial on the merits. (App., *infra*, 9) Subsequently, on a motion for rehearing by Bandera Electric, the Texas Fourth Court of Appeals withdrew its earlier decision, and affirmed the trial court dismissal. (App., *infra*, 2) The Texas Supreme Court subsequently denied review. (App., *infra*, 1)

B. THE FEDERAL ISSUES WERE RAISED AND RULED ON BELOW

The denial of due process guaranteed by the 14th Amendment of the United States Constitution was raised by the Petitioner before the Texas Supreme Court in his Petition for Review. (App., *infra*, 27, 30, 34, 36, 38) It was raised as well in the Texas Fourth Court of Appeals, by the Petitioner's Rebuttal to the motion for rehearing by Bandera Electric. (App., *infra*, 47) The failure of the courts below to respond specifically to the Constitutional due process issues, but to essentially ignore them, is no deterrent to presentation of these issues in this Court. *Chapman v. Goodnow's Adm'r.*, 123 U.S. at 548, *supra.*

REASONS FOR GRANTING THE PETITION

I. THE COURT BELOW DISREGARDED THE PROCEDURAL DUE PROCESS GUARANTEES OF THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION

A fundamental requirement of the due process guaranteed by the 14th Amendment of the United States Constitution is that a party receive notice reasonably calculated to apprise him of the nature of the action to be taken against him, and to afford him an opportunity to present objections. Robert Gilchrist complied with the order to replead by October 30, 1998, and was under no notice that his compliance with the order to replead would be rejected even though it complied with the Texas Rules of Civil Procedure.

Even assuming that the dismissal was for failure of Robert Gilchrist's counsel to appear in court on October 30, 1998, which the dismissal order of the trial court itself disputes, the notice provisons for the October 30, 1998, hearing were disregarded. They provide for a show cause hearing, the following Monday, to determine if dismissal would be appropriate. But the trial court acted summarily, in violation of its own notice to Petitioner, dismissing Robert Gilchrist's actions immediately. And there was no show cause hearing held on the following Monday.

In all respects, there was no reasonable notice to the Petitioner of the actions contemplated against him, and no opportunity to present his objections to those specific actions prior to their enactment, as required by the 14th Amendment of the United States. These federally guarantee requirements of due process were ignored by the Texas Supreme Court and the Texas Fourth Court of Appeals.

II. THE DECISIONS OF THE COURTS BELOW CONFLICT WITH RELEVANT DECISIONS OF THIS COURT

In *Peralta v. Heights Medical Center*, 485 U.S. 80, 84, 87 (1988), this Court held that there must a notice that is adequate to apprise the party of the action that is contemplated, and an opportunity given to the party to respond. Here we see there was no notice that Petitioner's cause would be dismissed if his new pleadings were not actually in the trial court on October 30, 1998, instead of simply being mailed by that date as required by the Texas Rules of Civil Procedure. And without notice of such contemplated action, the Petitioner had no opportunity to respond by pointing out that he was in compliance with Rule 5 of the Texas Rules of Civil Procedure.

And, of course, the notice of a hearing on the Monday next to show cause for dismissal for failure to appear, was also abrogated by the trial court, assuming that the dismissal was for this reason instead of that stated in the dismissal order.

Coe v. Armour Fertilizer Works, 237 U.S. 413, 424 (1915), is of like import. Adequate notice, and opportunity to respond, is required as part of the procedural due process guaranteed by the 14th Amendment. And for an earlier case of this Court, where there was actual notice to the Petitioner by the Texas state court of the precise action contemplated, but without adequate time to prepare a response to the action to be taken, see *Roller v. Holley*, 176 U.S. 398, 409, 413 (1900).

CONCLUSION AND PRAYER

The actions of the Texas state courts clearly violate the procedural due process rights of Petitioner guaranteed by the 14th Amendment of the United States Constitution, and are in conflict with the prior decisions of this Court. Petitioner prays that his petition for certiorari to the Texas Supreme Court be granted.

Respectfully submitted

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APPENDIX

TO

PETITION FOR A WRIT OF CERTIORARI

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THE SUPREME COURT OF TEXAS
Post Office Box 12248
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October 26, 2000

Mr. John B. Benton
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Mr. James A. Rindfuss
800 N.W. Loop 410, Suite 330N
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Re: Case Number 00-0921
Court of Appeals Number
04-98-00984-CV

Style: ROBERT GILCHRIST, d/b/a CONCAN CABLE TV
v.
BANDERA ELECTRIC COOPERATIVE, INC.

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above styled case.

Sincerely,

John Adams, Clerk

by /S/
Tanya R. Hunter, Deputy Clerk

cc: Mr. Herb Schaefer, Clerk
Ms. Lydia Steele
Mr. Earle Cobb, Jr.

App. 2

Court of Appeals
Fourth Court of Appeals District of Texas
San Antonio

OPINION

No. 04-98-00984-CV

Robert GILCHRIST, d/b/a Concan Cable TV,
Appellant

v.

BANDERA ELECTRIC COOPERATIVE, INC.,
Appellee

From the 38th Judicial District Court, Uvalde County, Texas
Trial Court No. 93-11-18, 734-A-CV
Honorable James C. Onion, Judge Presiding

ON APPELLEE'S MOTION FOR REHEARING

Opinion by: Sarah B. Duncan, Justice

Sitting: Catherine Stone, Justice
Sarah B. Duncan, Justice
Karen Angelini, Justice

Delivered and Filed: June 7, 2000

VACATED IN PART, AFFIRMED IN PART

Bandera Electric Cooperative, Inc. filed a motion for rehearing in this case on February 29, 2000. We grant the motion, withdraw our previous opinion and judgment delivered on January 12, 2000, and issue this opinion and judgment in its stead.

Robert Gilchrist appeals the trial court's dismissal of his case. We affirm the trial court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Bandera originally sued Gilchrist for breach of contract. Gilchrist asserted counterclaims for breach of contract, DTPA violations, antitrust violations, and coercion. The trial court granted Bandera's motion for summary judgment on its claim. While this court affirmed the summary judgment as it pertained to Bandera's claim, it remanded the case to the trial court for disposition of Gilchrist's counterclaims. *Gilchrist v. Bandera Elec. Coop.*, 04-94-00547-CV (Tex.App.-San Antonio March 18, 1998). Subsequently, the trial court severed Gilchrist's counterclaims from Bandera's cause of action and asigned a new cause number for Gilchrist's claims. The trial court further ordered that "Gilchrist as Plaintiff file on or before the 30 day of October, 1998, his causes of action restated in a Petition....sufficiently to apprise Defendant of the facts that Plaintiff asserts will support the respective causes of actions (sic) asserted." Two weeks later the district clerk sent to Earle Cobb, Jr., Gilchrist's attorney, a copy of an order stating that the new cause was set for trial on October 30, 1998. The order also stated:

IF NO APPEARANCE IS MADE BY EITHER PLAINTIFF, DEFENDANT, PETITIONER OR RESPONDENT, or their respective counsel, and no postponement has been granted by the Court, it is further ordered that there shall be a show cause hearing held at 9:00 a.m. on the Monday next following the date set out above, for the non appearing party or counsel to show good cause why a dismissal, default judgment or other sanctions should not be imposed by the Court for the nonappearance at the above time and date.

On October 30, both Gilchrist and his attorney, Earle Cobb, Jr., failed to appear. The same day, the trial court dismissed Gilchrist's causes of action, finding that Gilchrist did not appear for trial and " failed to file pleadings as ordered." On November 18, Gilchrist filed a notice of appeal. Later, Bandera filed an unverified motion to reinstate Gilchrist's causes of action. After Bandera filed its motion to reinstate, Cobb moved to withdraw as Gilchrist's attorney and to intervene for attorney's fees in the event Gilchrist recovered on his causes of action. The trial court held a hearing on Bandera's and Cobb's motions on January 15, 1999, and issued a new judgment on February 5, 1999. The trial court found that Gilchrist had received notice of the October 30, 1998 trial setting and did not

appear for trial. The trial court ordered Gilchrist's causes of action dismissed for a second time, denied any recovery to Cobb, and granted Cobb's motion to withdraw. Gilchrist filed a notice of appeal from the trial court's new judgment on February 5, 1999.

STANDARD OF REVIEW

We review dismissals for want of prosecution under the abuse of discretion standard. *MacGregor v. Rich,* 941 S.W.2d 74, 75 (Tex.1997)(per curiam); *Knight v. Trent,* 739 S.W.2d 116, 118 (Tex. App.-San Antonio 1987, no writ). That is, if the trial court's ruling resolves an issue of fact, we will not reverse the ruling unless "the trial court could reasonably have reached only one decision." *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). However, the "trial court has no discretion in determining what the law is or applying the law to the facts." *Id.*

DISCUSSION

Gilchrist contends Bandera's motion to reinstate his causes of action and the order denying it were valid. We disagree. A motion to reinstate must include the grounds for reinstatement and must be verified by the movant . *See* Tex. R. CIV.P 165a(3); *McConnell v. May*,

800S.W. 2d 194, 194 (Tex. 1990, orig. proceeding), and the trial court was without jurisdiction to enter the February 5, 1999 judgment.

Gilchrist also argues that when the trial court ordered his causes of action severed from Bandera's, it only required Gilchrist to restate his causes of action. Actually, the trial court's severance order realigned the parties, with Gilchrist now as the plaintiff, and ordered Gilchrist to restate causes of action on October 30, 1998, as required by the severance order. However, Gilchrist's pleading did not meet the requirements of the severance order because it was not filed under the new cause number and it was not in the form of a petition. *See City of Alice v. Lacey*, 362 S.W.2d 919, 920 (Tex. Civ. App.- San Antonio 1962, not writ) (refusal to replead as ordered by trial court justifies dismissal). Regardless, the trial court dismissed Gilchrist's causes of action not only for his failure to file pleadings as ordered, but also for his failure to appear for trial.

In his third, eighth, and ninth "points of argument", Gilchrist contends the only matter set for October 30, 1998, was a motion for new trial on the order to sever, and his causes of action were not set for trial. However the

record clearly indicates that the new cause was set for trial on October 30, 1998, and Gilchrist's attorney was notified of the setting. Thus, not only was Gilchrist required to file a petition on October 30, 1998, he was also required to appear for trial the same day. *See* Tex.R. Civ.P. 165a(1) (case may be dismissed if party seeking affirmative relief fails to appear for trial of which he had notice).

Gilchrist also contends whether the trial court granted the dismissal on its own motion or in view of the overall record and appeals. The dismissal order bearing the trial judge's signature clearly indicates the case was dismissed on the trial court's own motion, and there is no indication in the record otherwise. *See University of Texas v. Morris,* 162 Tex. 60, 344 S.W.2d 426, 429 (1961) (appellate court's review limited to record at the time of trial court's decision), *cert. denied,* 366 U.S. 973 (1961); *Siefkas v. Siefkas*, 902 S.W.2d 72, 74 (Tex. App.-El Paso 1995, no writ) (With limited exceptions ... an appellate court may not consider matters outside the appellate record.").

In his fifth point, Gilchrist argues this court should sanction Bandera's attorney because he falsified his certification to the court that Bandera's original answer

was served on Gilchrist's attorney on October 30, 1998. However, we are unable to find any evidence in the record that the certification was false. *See Siefkas,* 902 S.W.2d at 74. Gilchrist further argues in his sixth point that Bandera and its attorney should be sanctioned because they misled the trial judge by informing him that the causes of action were to be dismissed in view of the overall record and appeals. Again, however, there is no evidence that Bandera or its attorney made any such statements or misled the trial court in any way. *See id.*

CONCLUSION

Because the trial court was without pienary jurisdiction to modify its original dismissal order, we vacate the trial court's February 5, 1999 judgment. However, we further hold that Gilchrist has failed to show the trial court abused its discretion in originally dismissing his cause of action, overrule each of his points of error, and affirm the trial court's original dismissal order.

Sarah B. Duncan, Justice

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App. 9

Court of Appeals
Fourth Court of Appeals District of Texas
San Antonio

OPINION

No. 04-98-00984-CV

Robert GILCHRIST, d/b/a Concan Cable TV,
Appellant

v.

BANDERA ELECTRIC COOPERATIVE, INC,
Appellee

From the 38th Judicial District Court, uvalde County,
Texas Trial Court No. 93-11-18, 734-A-CV
Honorable James C. Onion, Judge Presiding

Opinion by: Sarah B. Duncan, Justice

Sitting: Catherine Stone, Justice
Sarah B. Duncan, Justice
Karen Angelini, Justice

Delivered and Filed: January 12, 2000

VACATED IN PART, REVERSED AND REMANDED IN PART

Robert Gilchrist appeals the trial court's dismissal of his case. We vacate the trial court's judgment because the trial court was without plenary power to modify its original dismissal. Moreover, we hold the trial court failed to give adequate notice of its intent to dismiss the case, reverse the trial court's original dismissal order, and remand the case for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Bandera originally sued Gilchrist for breach of contract. Gilchrist asserted counterclaims for breach of contract, DTPA violations, antitrust violations, and coercion. The trial court granted Bandera's motion for summary judgment on its claim. While this court affirmed the summary judgment as it pertained to Bandera's claim, it remanded the case to the trial court for disposition of Gilchrist's counterclaims. *Gilchrist v. Bandera Elec. Coop.*, 04-94-00547-CV (Tex. App.-San Antonio March 18, 1998). Subsequently, the trial court severed Gilchrist's counterclaims from Bandera's cause of action, assigned a new cause number for Gilchrist's claims, and ordered Gilchrist's original answer in Bandera's suit filed under the new cause number. The trial court further ordered that

"Gilchrist as Plaintiff file on or before the 30 day of October, 1998, his causes of action restated in a Petition...sufficiently to apprise Defendant of the facts that Plaintiff asserts will support the respective causes of actions (sic) asserted." Two weeks later, the trial court set the new case for trial on October 30, 1998.

Both Gilchrist and his attorney, Earle E. Cobb, Jr., failed to appear on October 30. The same day, the trial court dismissed Gilchrist's causes of action, finding that Gilchrist had "failed to file pleadings as ordered." On November 18, Gilchrist filed a notice of appeal. Later, Bandera filed an unverified motion to reinstate Gilchrist's causes of action. After Bandera filed its motion to reinstate, Cobb moved to withdraw as Gilchrist's attorney and to intervene foe attorney's fees in the event Gilchrist recovered on his causes of action. The trial court held a hearing on Bandera's and Cobb's motions on January 15, 1999, and issued a new judgment on February 5, 1999. The trial court found that Gilchrist had received notice of the October 30, 1998 trial setting and did not appear for trial. The trial court ordered Gilchrist's causes of action dismissed for a second time, denied any recovery , to Cobb, and granted Cobb's motion to withdraw. Gilchrist

filed a notice of appeal from the trial court's new judgment on February 5, 1999.

JURISDICTION TO MODIFY DISMISSALORDER

In the absence of a timely filed and verified motion to reinstate, the trial court's plenary jurisdiction expires thirty days after the order was signed. *See* TEX. R. CIV.P. 165a(3); *McConnell v. May*, 800 S.W.2d 194, 194 (Tex. 1990, orig. proceeding). While Bandera timely filed a motion to reinstate, it admittedly failed to verify the motion. Consequently, we hold the trial court's plenary power expired on November 30, 1998, TEX.R.CIV.P. 165a(3);*McConnell*, 800 S.W.2d at 194, and we therefore vacate the trial court's February 5, 1999 judgment.

DISMISSAL FOR FAILURE TO RESTATE CAUSES OF ACTION

We must next determine the validity of the trial court's original dismissal order.

Scope and Standard of Review

When a trial court has specifically stated the ground for dismissing a case, our review is limited to whether dismissal was proper on that ground. *Shook v. Gilmore & Tatge Mfg. Co.*, 951 S.W.2d 294, 296 (Tex.

App.-Waco 1997, pet. denied). Here, the trial court stated in its dismissal order "Robert Gilchrist, d/b/a Concan Cable TV has failed to file pleadings and ordered by this Court and Bandera Electric Cooperative, Inc. has filed a general denial....Accordingly, The Court, on its motion, hereby dismisses all causes of action heretofore alleged by Robert Gilchrist...." Thus, the court dismissed Gilchrist's causes of action for failing to restate his causes of action within the requisite period.

We review dismissals for want of prosecution under the abuse of discretion standard. *Knight v. Trent*, 739 S.W.2d 116, 118 (Tex. App.-San Antonio 1987, no writ); *see Sandstrum v. Magruder*, 510 S.W.2d 388, 391 (Tex. Civ. App.-Houston[1st Dist.] 1974, writ ref'd.n.r.e.) ("We recognize the discretionary power of the trial court to dismiss an action for want of prosecution upon failure of counsel to amend pleadings after an order sustaining exceptions."). That is, if the trial court's ruling resolves an issue of fact, we will not reverse the ruling unless "the trial court could reasonably reached only one decision." *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). However, the trial court "has no 'discretion' in determining what the law is or applying the law to the

facts." *Id.*

Notice

Gilchrist first argues the trial court erred in dismissing his causes of action because the court did not give him adequate notice of the dismissal. We Agree.

A trial court is required to provide parties with notice of its intent to dismiss a case for want of prosecution under either its inherent authority or Texas Rule of Civil Procedure 165a. *See* Tex.R.Civ.P.165a(1); *Villarreal v. San Antonio Truck & Equipment*, 994 S.W.2d 628, 630 (Tex. 1999). Even if a trial court provides notice of its intent to dismiss the case, the court may only dismiss the case on a ground adequately set forth in the notice. *See Villarreal*, 994 S.W.2d at 631-33. Here, the trial court sent Cobb a copy of the court's docket sheet informing him that the case was set for trial on October 30, 1998, and stating:

> IF NO APPEARANCE IS MADE BY EITHER PLAINTIFF, DEFENDANT, PETITIONER OR RESPONDENT, or their respective counsel, and no postponement has been granted by the Court, it is further ordered that there shall be a show cause hearing held at 9:00 a.m. on the Monday next following the date set out above, for the non appearing party or counsel to show good cause why a dismissal, default judgment or other sanctions should not be imposed by the Court for the non appearance at the above time and date.

Thus, the trial court clearly gave notice of its intent to dismiss the case if either party failed to appear. *Id.* At 631. However, the trial court did not dismiss the case because Gilchrist failed to appear for trial, and there is no evidence either Cobb or Gilchrist was notified that the trial court would dismiss the case if they failed to timely file restated causes of actions. Therefore, we hold the trial court abused its discretion in dismissing Gilchrist's causes of action because the court did not adequately notify him of its intent to dismiss his case for failing to replead. *See id.* at 630.

SANCTIONS

Finally, Gilchrist has moved for sanctions against Bandera and its attorney, arguing Bandera's attorney falsified the certificate of service on Bandera's Original Answer and misled the trial court by informing it that the case was dismissed in light of the overall record and appeal. However, we are unable to find any evidence of misconduct by Bandera's attorney in the record and decline to sanction either Bandera or its attorney.

CONCLUSION

Because the trial court was without plenary jurisdiction to modify its original dismissal order, we vacate the court's February 5, 1999 judgment. Furthermore, because the trial court failed to adequately notify Gilchrist of its intent to dismiss his case if he failed to timely restate his causes of action, we reverse the trial court's original dismissal order and remand the case for further proceedings.

Sarah B. Duncan, Justice

Do not publish

NO.93-11-18, 734-CV-A

BANDERA ELECTRIC COOPERATIVE, INC.	*	IN THE DISTRICT COURT
VS.	*	38TH JUDICIAL DISTRICT
ROBERT GILCHRIST, D/B/A CONCAN CABLE TV	*	UVALDE COUNTY, TEXAS

ORDER DISMISSING ALL CAUSES OF ACTION OF ROBERT GILCHRIST, D/B/A CONCAN CABLE TV

On the 30th day of October, 1998 came on BANDERA ELECTRIC COOPERATIVE, INC. and ROBERT GILCHRIST, D/B/A CONCAN CABLE TV. The Court finds that on September 21, 1998, the Court entered an order severing the counterclaims of Robert Gilchrist in cause number 93-11-18, 734-CV, entitled Bandera Electric Cooperative, Inc. v. Robert Gilchrist, d/b/a Concan Cable TV and assign cause number 93-11-18, 734-CV-A to the counterclaims of Robert Gilchrist and order that the parties realign themselves whereby Robert Gilchrist, d/b/a Concan Cable TV would be Plaintiff and Bandera Electric Cooperative, Inc. would be Defendant.

The Court further ordered that Robert Gilchrist set forth with specificity alleging facts as to each of his causes

of action that he mentioned as counterclaims and to file such pleadings thereon no later than October 30, 1998. The Court finds that Robert Gilchrist, d/b/a Concan Cable TV has failed to file pleadings as ordered by this Court and that Bandera Electric Cooperative, Inc. has filed a general denial, as the Defendant, to the alleged cause of actions enumerated by Robert Gilchrist in his last live pleadings entitled Defendant's Third Amended Answer. Accordingly,

The Court, on its motion, hereby dismisses all causes of action heretofore alleged by Robert Gilchrist, d/b/a Concan Cable TV against Bandera Electric Cooperative, Inc. with prejudice to Robert Gilchrist, d/b/a Concan Cable TV, to refile same as to any cause of action prior to the date of this order.

SIGNED this 30 day of October, 1998

_____/S/_____
Judge Presiding

TEXAS RULES OF CIVIL PROCEDURE
GENERAL RULES
TRCP 3a-5

TRCP 5 ENLARGEMENT OF TIME

When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (a) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order; or (b) upon motion permit the act to be done after the expiration of the specified period where good cause is shown for the failure to act. The court may not enlarge the period for taking any action under the rules relating to new trials except as stated in these rules.

If any document is sent to the proper clerk by first-class United States mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail on or before the last day for filing same, the same if received by the clerk no more than ten days tardily, shall be filed by the clerk and be deemed filed in time. A legible postmark affixed by the United States Postal Service shall be prima facie evidence of the date of mailing.

No. 93-11-18, 734-CV

ROBERT GILCHRIST	IN THE DISTRICT COURT
VS.	
BANDERA ELECTRIC COOPERATIVE, INC.	38TH JUDICIAL DISTRICT
	UVALDE COUNTY, TEXAS

Plaintiff's THIRD AMENDED ORIGINAL COUNTERCLAIM

TO THE HONORABLE DISTRICT JUDGE:

Now comes ROBERT GILCHRIST, Plaintiff, and files his Third Amended Original Counterclaim as ordered by the Court in the ORDER OF SEVERANCE dated September 21, 1998. Plaintiff would show the Court as follows:

1. GILCHRIST has denied and continues to deny each and every allegation contained in Bandera's Original Petition, and asks that those matters be set for a jury trial, and that Plaintiff be required to prove its allegations by competent evidence as provided by Rule 92.

2. GILCHRIST would further show that he is entitled to various affirmative defenses as set out in the

Rules of Civil Procedure. To the extent he is presently able, Defendant pleads the following affirmative defenses specifically:

a. Payment has been made by delivery of a check in the payment of the first invoice. The check has not been negotiated by Plaintiff, and apparently has been refused making the tender of further payment futile.

b. Plaintiff is estopped to claim a breach of contract by Defendant because it has refused payment and has refused to inspect the poles with Defendant.

c. Plaintiff has engaged in economic duress by threatening to remove Defendant's cable lines.

d. Plaintiff has waived provisions of the contract by failing to provide poles of a sufficient height to comply with the electrical code.

3. Plaintiff, GILCHRIST, would further show that he has a valid counterclaim against Defendant in the approximate amount of $ 400, 000.00. Defendant will show that BANDERA ELECRIC COOP has engaged in deceptive and unfair trade practices and seeks to cancel or void its contract with GILCHRIST in order to coerce GILCHRIST into bearing a portion of COOP'S expense of

upgrading its system or to obtain more favorable rental terms. More specifically BANDERA COOP has damaged GILCHRIST by refusing to accept payments which were tendered, by demanding amounts in excess of the contract price, by refusing to count posts, by changing and creating new standards, and by alleging that GILCHRIST was in violation of the National Electric Safety Code. GILCHRIST would further show that he is entitled to exemplary damages for unfair trade practices and to attorneys fees.

WHEREFORE, Premises considered, Defendant prays that this claim be filed, that this matter be set for trial before a jury, and that Plaintiff take nothing by this suit and that Defendant recover his actual damages, costs, and attorneys fees for breach of contract, and that he recover actual damages for unfair trade practices, exemplary damages and attorneys fees, and such other relief to ehich he may show himself entitled at law or in equity.

/S/
EARLE COBB, JR.
Attorney at Law
101 Stumberg
San Antonio, Texas 778204
(210) 227 0606, TBA4442000

CERTIFICATE OF SERVICE

A true copy of the foregoing was delivered to the attorneys listed below on the 30th day of October, 1998.

James A. Rindfuss
Attorney at Law
110 Sprucewood
San Antonio, Texas 78216

/S/
EARLE COBB JR.

NO:

THE
SUPREME COURT OF TEXAS
AUSTIN, TEXAS

ROBERT GILCHRIST, D/B/A CONCAN CABLE TV
Petitioner

vs.

BANDERA ELECTRIC COOPERATIVE, INC.
Respondent

From the Fourth Court of Appeals
San Antonio, Texas
No. 04-98-00984-CV
Justices: Stone, Duncan, Angelini

PETITION FOR REVIEW

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Attorney for Petitioner
Robert Gilchrist, D/B/A Concan Cable

Identity of Parties and Counsel

Petitioner:	Robert Gilchrist, D/B/A Concan Cable TV
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Intervenor:	Earle Cobb, Jr. 101 Stumberg San Antonio, Texas 78205 (pro se)
Amicus Curiae:	Earl M. Herring
Attorney for Amicus Curiae:	Jad P. Harper THE HERRING LAW FIRM 505 Quarry Street Eagle Pass, Texas 78852
Respondent:	Bandera Electric Cooperative, Inc.

Attorney for Respondent: James A. Rindfuss
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Statement of the Case

This is a suit for damages in which a judgment, entitled "Order Dismissing all Causes of Action of Robert Gilchrist, D/B/A Concan Cable TV," was signed by James C. Onion, sitting in the 38th Judicial District Court of Uvalde County, Texas, on October 30, 1998. (Apx.tab 1; CR 4-5)

The parties in the court of appeals were Robert Gilchrist, Appellant, Bandera Electric Cooperative, Inc., Appellee, and Earl Cobb, Jr., Intervenor. (The intervention of Earl Cobb, Jr., was for his alleged attorney fees.)

The Fourth Court of Appeals, San Antonio, Texas, Justices Catherine Stone, Sarah B. Duncan,

and Karen Angelini, issued an opinion; authored by Justice Sarah B. Duncan, which affirmed the order of the trial court dismissing Petitioner's case. (Apx. Tab 2)

This court of appeals opinion reversed and vacated an earlier opinion of the court of the appeals on the same appeal, which would have reinstated the Petitioner's case on the basis of *Villarreal v. San Antonio Truck & Equipment,* 994 S.W.2d 628 (Tex. 1999). (Apx. tab 5)

These opinions of the court of appeals are unpublished.

Motion for rehearing by Petitioner was denied August 4, 2000. (Apx. tab 7)

Statement of Jurisdiction

The Supreme Court has jurisdiction pursuant to Government Code Section 22.001(a)(2), because the court of appeals' decision conflicts with this Court's decision in *Villarreal v. San Antonio Truck & Equipment*, 994 S.W.2d 628 (Tex. 1999).

The Supreme Court also has jurisdiction pursuant to Government Code Section 22.001(a)(6), because the court of appeals has committed an error of law of such importance to the state's jurisprudence that it should be

corrected.

Issues Presented

First Issue: the trial court's dismissal of plaintiff's action, for failure to file pleadings as ordered by the court, which pleadings were in fact filed timely pursuant to Rule 5, Texas Rules of Civil Procedure, was in violation of Petitioner's due process rights;

Second Issue: the trial court's dismissal of plaintiff's action, for alleged failure to file pleadings as ordered by the court, without notice of intent to dismiss on that basis and a hearing, was in violation of the Petitioner's due process rights;

Third Issue: the trial court's notice to plaintiff that failure to appear would result in a show cause hearing the following Monday to dismiss, but were the trial court dismissed the plaintiff's action summarily without waiting such show cause hearing, was in violation of the Petitioner's due process rights;

Fourth Issue: the above described acts or omissions of the trial court constitute a violation of due process rights of Petitioner guaranteed by the 14th Amendment of the United States Constitution.

Statement of Facts

The statement of facts by the court of appeals is incorrect in stating that the trial court dismissed petitioner's case not only for failure to replead, but also for failure to appear. The order of the trial court is clear on this point. While noting that Petitioner failed to appear, it specifically states that the dismissal is because the Petitioner "failed to file pleadings as ordered by this Court." (Apx. tab 1; CR 4-5)

Another essential fact, not mentioned in the court of appeals' opinion, is that the pleadings ordered by the trial court had been filed that day by mail, and were timely pursuant to Rule 5, Texas Rules of Civil Procedure, but were not physically before the trial court for any determination that they were inadequate. (Apx. tab 6; CR 6-8)

In other respects the statement of facts by the court of appeals is correct.

Summary of the Argument

First Issue:

By order of September 21, 1998, the trial court ordered the Petitioner to replead his causes of action by October 30, 1998. (CR 1-4) This was done by the Petitioner, by pleadings filed by United States mail on October 30, 1998. (Apx tab 6; CR 6-8) Pursuant to Rule 5, Texas Rules of Civil Procedure, this was timely filed (if received within ten (10) days of mailing). (Apx. tab 3) Nevertheless, the trial court dismissed the Petitioner's action on October 30, 1998, for the specific reason, "that Robert Gilchrist, d/b/a Concan Cable TV has failed to file pleadings as ordered by this Court." (Apx. tab 1; CR 4-5) Contrary to the statement of the court of appeals, the dismissal was for failure to file, and not for any inadequacy in what was in fact filed. Dismissal for failure to file a pleading, which was in fact filed in accordance with the rules of procedure, is in violation of the Petitioner's due process rights.

Second Issue:

The Petitioner had no notice that his cause of action would be dismissed for failure to file pleadings, even if, arguendo, the pleadings that were in fact filed were not in compliance with the trial court's order. (Apx. tab 4; CR Supplemental tab 1) Such dismissal, without notice of the basis for dismissal, and an opportunity to be heard on the issue, is in violation of the Petitioner's due process rights.

Third Issue:

The notice that was received by Petitioner's attorney stated that failure to appear on October 30, 1998, would result in a show cause hearing on the following Monday to determine if the case should be dismissed. The record is clear there was no show cause hearing on Monday. The case was summarily dismissed on October 30, 1998, (Apx. tab 1; CR 4-5), in violation of the trial court's own notice. (Apx. tab 4; CR Supplemental tab 1) Such false notice, and lack of notice that the case would be dismissed on October 30 instead of after hearing on the following Monday, is in violation of the Petitioner's due process rights.

Fourth Issue:

A fundamental requirement of due process, guaranteed by the Fourteenth Amendment of the United States Constitution, is that a party receive notice reasonably calculated to apprise him of the nature of the action contemplated against him, and to afford him an opportunity to present objections. Whether the dismissal was for failure to file pleadings as ordered by the trial court, as stated in the order of dismissal, or for failure to appear, as extemporaneously projected by the court of appeals, there was inadequate notice to satisfy the requirements of due process of the Fourteenth Amendment.

The Argument.

As this Court stated in *Villarreal v. San Antonio Truck & Equipment*, 994 S.W.2d 628, 630 (Tex 1999):

> "[A] party must be provided with notice and an opportunity to be heard before a court may dismiss a case for want of prosecution under either Rule 165a or its inherent authority.

The reason given for dismissal was false.
The pleadings had been filed.

The trial court's dismissal on the basis of failure to to file pleadings, which is a variety of alleged want of prosecution, was without notice to the Petitioner. And, of course, there was no opportunity to be heard prior to the dismissal.

The opportunity to be heard prior to dismissal is crucial, as, in this instance, the Petitioner could have pointed out to the trial court that the premise for dismissal was false. I.e., the pleadings had been properly filed, pursuant to Rule 5. And there was no notice that the pleadings were required to be before the trial court on October 30, instead of following the allowed filing by United States mail contemplated by Rule 5.

The position taken by the court of appeals, that the pleadings did not comply with the order requiring them, is out of place. The trial court made no such determination. The pleadings were not even there for such a determination when the Petitioner's case was dismissed. It is not sufficient for the court of appeals to say that if the pleadings that were filed were examined, that they would

be inadequate and a basis for dismissal, and therefore a preemptive dismissal, as it were, is justified.

This line of reasoning was dealt with, and found inapplicable, in both *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 108 S.Ct. 896, 900 (1988), *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 35 S.Ct. 625, 629 (1915). It is no defense to say that if the form of the pleadings had, indeed, been ruled upon by the trial court, the result would have been the same. The holding that the pleadings had not been filed as ordered by the court is apparently incorrect.

There was no notice of dismissal for failure to file pleadings.

The notice must correspond to the action to be taken. As clearly enunciated by this Court in *Villarreal supra,* as well as by the United States Supreme Court in *Peralta* and *Coe, supra*, there must be notice that apprises the party of the basis for the intended dismissal, and opportunity given for objections to be made to dismissal on that stated basis.

The notice, as correctly quoted by the court of appeals, only relates to possible dismissal for failure to appear for the docket call on October 30. The notice is obviously a docket call, since apparently every case in that court is listed and only a tiny fraction of them could actually go to trial. But the notice was nevertheless denominated a trial setting. Regardless of the nomenclature, however, the notice did not specify that a dismissal for failure to file pleadings would be considered and enacted on October 30. Such notice, and opportunity to be heard, is a prerequisite for dismissal on that basis.

The dismissal notice was not followed by the trial court.

As correctly noted by the court of appeals, the notice sent by the trial court and received by the Petitioner's attorney, states, that in the event of non-appearance:

> [T]here shall be a show cause hearing held at 9:00 a.m. on the Monday next following the date set out above, for the nonappearing (sic) party or counsel to show good cause why a dismissal, default judgment or other sanctions should not be imposed by the Court for the nonappearance at the above time and date. (Apx. tab 4; CR Supplemental tab 1)

There was no hearing on the Monday next. The dismissal order is dated October 30, 1998. Even if the dismissal was for failure to appear, which is not the stated basis in the dismissal order, the notice of the trial court was not followed. Within the holdings of the above cited cases, it is clear that notice of a hearing to dismiss on one date, but with dismissal actually accomplished on another, it is not adequate to apprise the procedural victim of the impending consequences and an opportunity to present objections.

The denial of due process also violates the 14th Amendment.

The United States Supreme Court cases are numerous on this point. While others could be cited, the above referenced cases of *Peralta v. Heights Medical Center, supra*, and *Coe v. Armour Fertilizer Works, supra*, make it very clear. The Fourteenth Amendment of the United States requires, as a matter of due process, that the party whose property is to be denied must have reasonable and adequate notice of the impending action, with an opportunity to be heard.

This appears to have been a requirement of due process under the Fourteenth Amendment from time immemorial. See, in a different context, *Roller v. Holley*, 176 U.S. 398, 20 S.Ct. 410 (1900). This was not accorded to the Petitioner in this case.

Prayer

Premises considered, the Petitioner prays for an order of this Court reversing the order of the court of appeals and remanding the Petitioner's cause of action for trial on the merits.

Respectfully submitted

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Certificate of Service

I hereby certify that a correct copy of the above was served by United States first class mail this 8th day of September, 2000, as follows:

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_____
John B. Benton

App. 41

NO. 04-98-00984-CV

IN THE COURT OF APPEALS
FOURTH COURT OF APPEALS DISTRICT
SAN ANTONIO, TEXAS

ROBERT GILCHRIST, D/B/A CONCAN CABLE TV,
Appellant

vs.

BANDERA ELECTRIC COOPERATIVE, INC.,
Appellee

On Appeal from the 38th Judicial District Court,
Uvalde County, Texas
Trial Court No. 93-11-18, 734-A-CV
Honorable James C. Onion, Judge Presiding

APPELLANT'S REBUTTAL TO APPELLEE'S MOTION FOR REHEARING

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APPELLEE: BANDERA ELECTRIC COOPERATIVE, INC.
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ATTORNEY FOR APPELLEE: JAMES A. RINDFUSS
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LIST OF AUTHORITIES

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App. 44

NO. 04-98-00984-CV

IN THE COURT OF APPEALS
FOURTH COURT OF APPEALS DISTRICT
SAN ANTONIO, TEXAS

ROBERT GILCHRIST, D/B/A CONCAN CABLE TV,
Appellant

vs.

BANDERA ELECTRIC COOPERATIVE, INC.,
Appellee

On Appeal from the 38th Judicial District Court,
Uvalde County, Texas
Trial Court No. 93-11-18, 734-A-CV
Honorable James C. Onion, Judge Presiding

APPELLANT'S REBUTTAL TO APPELLEE'S MOTION FOR REHEARING

TO THE HONORABLE COURT OF APPEALS:

Comes now Robert Gilchrist, Appellant, with his rebuttal to the Appellee's motion for rehearing, and in support of the Court of Appeals Opinion delivered and filed January 12, 2000, as follows:

REBUTTAL POINTS

REBUTTAL POINT NO. 1: The Court of Appeals correctly construed the Order of Dismissal as being for failure to comply with an order of the Trial Court on September 21, 1998, ordering the Appellant to replead his causes of action.

REBUTTAL POINT NO. 2: The Court of Appeals correctly found that Appellant failed to receive adequate notice of dismissal for failure to timely file the required pleading.

REBUTTAL POINT NO. 3: Regardless or not the Appellant may be in some way estopped from prevailing upon remand, due process requires that the Appellant be restored to the position he would have occupied had due process of law been accorded to him in the first place.

REBUTTAL POINT NO. 4: There is no requirement the Appellant file a motion in the trial court to reinstate prior to filing his appeal in this Court.

REBUTTAL POINT NO. 5: Even if dismissal of the Appellant's case was for failure to appear, as argued by Appellee, it was excusable neglect pursuant to Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 393, 122 S.W. 579, 682 (1934), and its progeny.

REBUTTAL POINT NO. 6: There is no authoritative or valid holding of the trial court that Appellant's failure, either to replead or to appear, was the result of his conscious indifference.

ARGUMENT AND AUTHORITY

Rebuttal Point No. 1.

The terms of the order itself are conclusive. I.e.:

> The Court further ordered that Robert Gilchrist set forth with specificity alleging facts as to each of his causes of action that he mentioned as counterclaims and to file such pleadings thereon no later than October 30, 1998. The Court finds that Robert Gilchrist, d/b/a Concan Cable TV has failed to file pleadings as ordered by this Court....Accordingly,
> The Court.....hereby dismisses all causes of action heretofore alleged by Robert Gilchrist.....

The dismissal was, "accordingly," for failure to file amended pleadings by October 30, 1998.

Rebuttal Point No. 2

The notice that a dismissal or default would be entered by the trial court explicitly, and very narrowly, states that this disaster will be inflicted for failure to appear.

As the Supreme Court expressed in Villarreal v. San Antonio Truck & Equipment, 994 S.W.2d 628, 632, 633 (Tex. 1999), the dismissal notice must be consistent with the action taken.

That a party must have notice of the intended result before it is inflicted upon him is axiomatic. See, for instance, Peralta v. Heights Medical Center, Inc., 485 U.S. 80, 84, 108 S.Ct. 896, 899, 99 L.Ed.2d 75 (1988), stating, "Failure to give notice violates the most rudimentary demands of due process of law."

Rebuttal Point No. 3.

The Appellant is entitled to due process of law, even if it puts him back into untenable position. As stated in Coe v. Armour Fertilizer Works, 237 U.S. 413, 424, 35 S.Ct. 625, 629, 59 L.Ed. 1027 (1915):

> To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits.

As indicated in Peralta and Coe, supra, as well as well as other Supreme Court cases, the only antidote for the absence of due process suffered by Appellant is to wipe

the slate clean and put him back in the position he held before the dismissal.

Rebuttal Point No. 4.

There is no requirement that the Appellant file a motion in the trial court to reinstate prior to filing his appeal in this Court. Appellee's argument to the contrary is incorrect and pointless. See Rule 324, Texas Rules of Civil Procedure, which lists specifically the complaints for which a motion for new trial is a prerequisite for appeal. They pertain either to issues on which additional evidence must be heard before appeal, or actions relating to jury trials. This particular situation is not included.

Rebuttal Point No. 5.

Even if, as argued by Appellee, the dismissal was for failure to appear, there would have to be a finding that such failure was not the result of excusable neglect on the part of the Appellant. The cases defining and redefining this issue run from Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 393, 122 S.W.579, 682 (1934), to Washington v. McMillan, 898 S.W.2d 392, 396 (Tex App.- San Antonio 1995, no writ), and beyond.

Washington v. McMillan would be especially applicable here, if this were indeed the issue. In that case the attorney for Appellant received in his office a notice of a summary judgment hearing. Regardless of the inefficiency or neglect of the attorney, the Appellant personally had no notice. As the Court stated,

> Who in good conscience can say that Washington, who is not at all to blame for failing to respond.....should be made to bear the ultimate penalty..... We are not willing to do so.

It appears from the briefs heretofore filed that the Appellant's attorney first stated he had no notice of the hearing, then admitted that he had received notice, and then resigned from representation of the Appellant. Basic fairness, as applied by this Court of Appeals in Washington v. McMillan, should also prevail in favor of the Appellant if this were in fact the issue.

Rebuttal Point No. 6.

Relative to the previous point, it may be worth pointing out that there is no valid or authoritative holding of the trial court that Appellant's failure either to replead timely or to appear was the result of conscious

indifference. Any such finding by the trial court would have occurred after its plenary power had expired.

PRAYER

WHEREFORE, premises considered, Appellant ask that Appellee's motion for rehearing be in all things denied.

Respectfully submitted

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Certificate of Service

I hereby certify that a true copy of the foregoing document was served by United States Certified Mail, return receipt requested, this 3rd day of April, 2000, as follows:

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